

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARY HARRIS,

Defendant.

Case No. 2:13-cr-00139-JAD-PAL

ORDER

(Mtn for Subpoena – Dkt. #40)

This matter is before the court on Defendant Gary Harris’ Emergency Sealed Ex Parte Motion for a Court Order for a Subpoena (Dkt. #40) filed September 4, 2014 at 3:59 pm.

Harris seeks an order requiring the Clerk of Court to issue a subpoena duces tecum to the custodian of records for Las Vegas Metropolitan Police (“LVMPD”) for photographs under an LVMPD event number identified on the proposed subpoena, attached to Harris’ Motion as Exhibit D.

It was filed as an emergency motion because an evidentiary hearing on Harris’ Motion to Suppress is set for September 8, 2014. Defense counsel served a subpoena duces tecum on Detective Starkes requesting that he bring all police reports and photographs from the event number to the hearing. However, a representative of LVMPD called the Federal Public Defender’s office and advised that Detective Starkes would not bring the photographs and the department would require a separate subpoena for them. The evidentiary hearing in this case was originally set for August 12, 2014, and has been continued twice by stipulation of counsel. The motion is an “emergency” only because counsel did not attempt to serve a subpoena for these photographs until September 2, 2014.

///

1           Additionally, little justification exists for filing this motion ex parte under seal. Counsel  
 2 for Harris has requested these photographs from government counsel beginning August 19, 2014,  
 3 a week after the initial evidentiary hearing was scheduled, and the Motion does not disclose any  
 4 mental impressions or defense strategy.

5           Rule 17 of the Federal Rules of Criminal Procedure governs the issuance of subpoenas in  
 6 criminal proceedings. Rule 17(c) establishes the process by which federal courts can issue  
 7 subpoenas duces tecum for the production of evidence before trial and provides:

8                     A subpoena may order the witness to produce any books, papers,  
 9 documents, data, or other objects the subpoena designates. The  
 10 court may direct the witness to produce the designated items in  
 11 court before trial or before they are to be offered in evidence.  
 When the items arrive, the court may permit the parties and their  
 attorneys to inspect all or part of them.

12       Fed. R. Crim. P. 17(c)(1).

13           Unlike a subpoena issued under Rule 17(a) or 17(b) to compel a witness to appear at trial,  
 14 the court has discretion to direct that a subpoena duces tecum be made returnable **before** trial.  
 15 However, Rule 17 is not a discovery device. *United States v. Nixon*, 418 U.S. 683, 689 (1974),  
 16 *superceded by statute on other grounds*, Fed. R. Evid. 104(a); *see also United States v.*  
 17 *LaRouche Campaign*, 841 F.2d 1176, 1179 (1st Cir. 1988); *United States v. Fletcher*, 461 F.  
 18 Supp. 2d 1101, 1102 (D. Ariz. 2006) (“[s]ubpoenas issued pursuant to Rule 17(c) are not  
 19 discovery devices and may not be used to expand the scope of Rule 16”); *United States v.*  
 20 *Shinderman*, 232 F.R.D. 147, 150 (D. Me. 2005); *United States v. Carter*, 15 F.R.D. 367, 369 (D.  
 21 D.C. 1954) (“to construe Rule 17 as a discovery rule would render Rule 16 nugatory and  
 22 meaningless and would defeat its limitations”). Rule 17(c) may, however, be used to obtain  
 23 evidentiary materials. *See Nixon*, 418 U.S. at 699-700; *Bowman Diary Co. v. United States*, 341  
 24 U.S. 214, 219-20 (1951).

25           Rule 17(c)(1) does not authorize a party to subpoena a witness and require him to report  
 26 at some time or place other than either a trial or hearing to be held at which he is to testify. Its  
 27 purpose is to permit the issuance of subpoenas only to compel attendance at hearings conducted  
 28 by the court and trial. *See United States v. LaFuente*, 54 F.3d 457 (8th Cir. 1995), *cert. denied*,

1 516 U.S. 902 (prosecutor improperly secured attendance of witness at pretrial interview by  
 2 subpoena); *United States v. Keen*, 509 F.2d 1273 (6th Cir. 1975) (government's use of subpoenas  
 3 to compel witnesses to attend pretrial interview miles from place of trial at a proceeding not  
 4 authorized by court was improper); *United States v. Stirone*, 168 F. Supp. 490 (D. Pa. 1957),  
 5 *aff'd*, 262 F.2d 571 (3rd Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960) (improper for  
 6 government to issue subpoenas compelling witnesses to appear at U.S. Attorney's Office in  
 7 federal courthouse to ensure keeping of proper records).

8 Leave of court is required for a pretrial subpoena duces tecum. *United States v.*  
 9 *Beckford*, 964 F. Supp. 1010, 1021 n.10 (D. Va. 1997). A number of courts have held that the  
 10 court has discretion to require production of documents by subpoena duces tecum prior to trial.  
 11 *United States v. Lieberman*, 608 F.2d 889 (1st Cir. 1979), *cert. denied*, 444 U.S. 1019; *United*  
 12 *States v. Parker*, 586 F.2d 422 (5th Cir. 1978), *cert. denied*, 441 U.S. 962; *United States v.*  
 13 *Murray*, 297 F.2d 812 (2nd Cir. 1962), *cert. denied*, 369 U.S. 828. The Supreme Court has  
 14 stated:

15 Enforcement of a pretrial subpoena duces tecum must necessarily  
 16 be committed to the sound discretion of the trial court since the  
 17 necessity for the subpoena most often turns upon a determination  
 18 of factual issues. Without a determination of arbitrariness or that  
 the trial court finding was without record support, an appellate  
 court will not ordinarily disturb a finding that the applicant for a  
 subpoena complied with Rule 17(c).

19 *Nixon*, 418 U.S. at 702.

20 The burden is on the party seeking production to show good cause for the production  
 21 before trial. In *United States v. Iozia*, the district court formulated a standard for establishing  
 22 good cause for production prior to trial requiring a showing:

- 23 1. That the documents are evidentiary and relevant;
- 24 2. That they are not otherwise procurable by the defendant
- 25 3. That the defendant cannot properly prepare for trial
- 26 without such production and inspection in advance of trial
- 27 4. That the application is made in good faith and is not
- intended as a general fishing expedition.

28 ///

1 13 F.R.D. 335, 338 (D.C.N.Y. 1952). Other federal courts have generally followed the *Iozia* test  
2 for establishing good cause for pretrial production. *See, e.g., Nixon*, 418 U.S. at 699; *United*  
3 *States v. Stein*, 488 F. Supp. 2d 350, 366 (S.D.N.Y. 2007); *U.S. v. Gel Spice Co., Inc.*, 601 F.  
4 Supp. 1214 (D.C.N.Y. 1985).

5 Harris' Motion for a subpoena duces tecum does not articulate why the materials  
6 described in the proposed subpoenas are evidentiary and relevant. However, based on the issues  
7 raised in Harris' Motion to Suppress, the court will grant in part and deny in part the Motion.  
8 The request to direct the custodian to produce the photographs and reports on September 8, 2014,  
9 at the evidentiary hearing "*or as directed by counsel*" is denied. *See* Exhibit D to Motion  
10 (emphasis added). Rule 17(c)(1) does not authorize issuance of a subpoena duces tecum  
11 requiring pretrial production of documents to any place other than the hearing. The custodian  
12 shall bring the materials to the evidentiary hearing.

13 Additionally, the proposed subpoena requires a non-party to produce the items specified  
14 on very short notice. The court has no idea whether compliance on such short notice would be  
15 unreasonable or oppressive. Rule 17(c)(2) authorizes witnesses to whom subpoenas are directed  
16 to file a motion to quash or modify the subpoenas "promptly" "if compliance would be  
17 unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). The court will address any such claim  
18 by LVMPD at the evidentiary hearing, allowing LVMPD or its counsel a reasonable opportunity  
19 to be heard.

20 The court will direct issuance of a subpoena duces tecum, as modified by this Order,  
21 directing the custodian of records for LVMPD to produce the records at the evidentiary hearing  
22 on September 8, 2014, at 9:30 a.m. Harris' request to have responsive materials produced "as  
23 directed by counsel" is denied.

24 Accordingly,

25 **IT IS ORDERED** that Harris' Motion for Subpoenas Duces Tecum (Dkt. #40) is  
26 GRANTED IN PART AND DENIED IN PART as follows:

- 27 1. Harris' request for a pretrial subpoena duces tecum compelling the custodian of  
28 records for LVMPD to bring the photographs from event #130329-5301 to the

1                   evidentiary hearing on September 8, 2014, at 9:30 a.m. is GRANTED, without  
2                   prejudice to LVMPD's opportunity to move to quash or modify pursuant to Fed.  
3                   R. Cr. P. 17(c)(2).

4           2.     The Clerk of Court shall issue a subpoena to:

5                             Custodian of Records  
6                             Las Vegas Metropolitan Police  
7                             400 S. Martin Luther King Blvd., Building C  
8                             Las Vegas, NV 89106


8                   The custodian of records shall produce all photographs from event #130329-5301  
9                   and all photographs from the execution of the search warrant in Mr. Harris' case.

10                  The custodian shall bring the photographs to the evidentiary hearing scheduled for  
11                  September 8, 2014, at 9:30 a.m., in the Lloyd D. George United States  
12                  Courthouse, Courtroom 3B.

13           2     Counsel for Harris shall serve the subpoena duces tecum on the custodian of  
14                  records for LVMPD, along with a copy of this Order.

15           3.     Harris' request that any responsive materials be produce "as directed by counsel"  
16                  is DENIED.

17           Dated this 5th day of September, 2014.

18  
19     
20   PEGGY A. LEEN  
21   UNITED STATES MAGISTRATE JUDGE  
22  
23  
24  
25  
26  
27  
28